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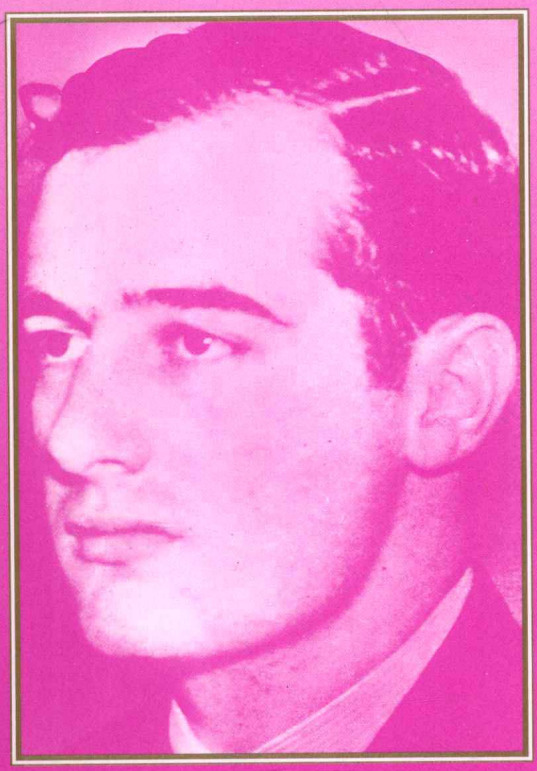

By Maria Eriksson

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Part I:

Introduction

Legal language does more than express thoughts. It reinforces certain world views and understandings of events.[1]

1 L. Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning', 64 *Notre Dame Law Review* 886 (1989), p. 888.

1 The Definition of Rape in an International Perspective

1.1 Background

The United Nations (UN) Secretary-General has emphasised that the elimination of violence against women remains one of the most serious challenges of our times.[2] Rape, as a crime that principally affects women and its prevalence in all states, cultures and contexts, whether in an armed conflict or peacetime, represents a prime example of this challenge. Sexual violence committed in armed conflicts has been termed "history's greatest silence" by the UN and its eradication is considered to be a central issue and a "top priority" in the work of the organisation.[3] Part of the task has lain in ending the "greatest silence" – that is, to systematically address and condemn sexual violence. The work involves exposing such myths as rape being an inevitable by-product of war or an expression of local cultural traditions, rather than, for example, as a war crime or as discrimination on the basis of sex.[4] Rape in war is frequently understood to be an "intractable cultural trait"[5] and outside of that context as a "private matter" perpetrated by lone, sexual deviants. Such fictions serve to minimise the gravity of the crime and fail to acknowledge its pervasive nature. Another part of the challenge is to, beyond solely addressing the widespread occurrence of rape, take measures to eradicate the practice. Rape in all contexts has largely been characterised by a culture of impunity, and it is maintained that changing a culture of impunity requires the

2 In-Depth Study on all Forms of Violence against Women, Report of the Secretary-General, UN Doc. A/61/122/Add.1, 6 July 2006, para. 2.

3 "Ending History's Greatest Silence", Speech by Inés Alberdi, Executive Director, UNIFEM, 8 July 2009 & UN Action Against Sexual Violence in Conflict Programme, Security Council, 6196th meeting, UN Doc. S/PV.6196, 5 October 2009, p. 3.

4 SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June 2008 & "Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says", UN News, 25 March 2010.

5 "Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says", *ibid.*

reformation of national laws to recognise such acts as crimes.[6] Improving the legislative framework on these matters has been stressed as essential by the UN Secretary-General.[7] This book aims to examine emerging obligations for states in international law to enact criminal laws entailing a prohibition on rape and consider the question of whether or not such duties should extend to include the adoption of a particular definition of the crime.

Within the field of public international law, the prohibition of sexual violence was until recently approached in a tentative manner, whether in international human rights law, international humanitarian law (IHL) or in international criminal law. The 1949 Geneva Conventions depicts rape as harming a woman's honour, rather than as an act against the physical integrity or autonomy of the person.[8] Transcripts from the Nuremberg war trials held in 1945–1946 demonstrate an extensive practice of rape committed by the armed forces of several nations in various areas of occupation during the Second World War.[9] Witness testimony on indiscriminate mass rape and sexual mutilation of women of all ages before relatives and neighbours is interspersed in the transcripts. However, the focus of the trials remained on other violations deemed to be of a graver nature and no individual was prosecuted for rape as an international crime.[10] The area of international criminal law, which in effect developed from the establishment of the Nuremberg tribunal, from its inception thus disregarded sexual violence, treating it as an unfortunate side-effect of war and not of international

6 *Ibid. See also* The State of Human Rights in Europe: The Need to Eradicate Impunity, Council of Europe, Committee on Equal Opportunities for Women and Men, Doc. 11964, 23 June 2009.

7 Report of the Secretary-General, Women and Peace and Security, UN Doc. S/2009/465, 16 September 2009, para. 42 & SC Res. 1888 on Women, Peace and Security, UN Doc. S/RES/1888, 30 September 2009, para. 6.

8 *See* Article 27, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S 287 (Geneva Convention IV).

9 Trial of the German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremburg, 14 November 1945 – 1 October 1946 (42 Vols.), Published at Nuremberg 1947, (IMT Docs.).

10 Prosecution occurred of sexual violations as subsets of international crimes during the Tokyo trials following the Second World War. However, this was limited and unsatisfactory in scope and substance. *See* The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, 1946-1948 (IMTFE Docs.). This will be further discussed in chapter 8.4. Domestic prosecutions also took place, such as in the Netherlands (*see* Final Report by Ms. Gay J McDougall, Special Rapporteur, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 62), US (Court of Military Appeals, *John Schultz case*, Judgment 5 August 1952), China (*Takashi Sakai case*, War Crimes Military Tribunal of the Ministry of National Defence, Judgement 29 August 1946). *See* list on national practice: ICRC Customary IHL: Practice Relating to Rule 93. Rape and Other Forms of Sexual Violence, <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule93>, visited on 7 November 2010. However, these prosecutions were not sufficiently significant to set an international precedent.

concern. That patterns of violence become normalised when followed by impunity is evident. Rape as a tactic of war is becoming increasingly employed as the nature of armed conflict changes, frequently occurring in populated areas and with the deliberate targeting of civilians.[11] The brutal and systematic use of sexual violence as a tactic of war in the armed conflicts in Rwanda and former Yugoslavia, with approximately 500,000 and 60,000 rapes committed respectively, is a testament to this, as are the mass rapes in more recent conflicts in *e.g.* Sierra Leone, the Democratic Republic of the Congo (DRC) and Darfur.[12]

Rape outside the context of armed conflict occurs in all societies by strangers, acquaintances and intimate partners. Domestic laws prohibiting rape vary greatly, frequently affirming gender stereotypes, *e.g.* in viewing the offence as a crime against the honour of the woman, and excluding certain categories of victims, such as spouses or prostitutes, or requiring proof of resistance. The corresponding recognition of women's rights as universal human rights was, similarly to international criminal law, a late concern of the international community since the types of violations that women often suffer have been considered to be of a "private" nature, within the confines of the internal affairs of states and not to be regulated by public international law. As acts of private violence, the criminalisation of sexual violence has thus been strictly deferred

11 "Cost of Violence against Women 'Beyond Calculation', warns UN Chief", UN News, New York, 8 March, 2009, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2005/740, para. 3, K. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', 21 *Berkeley Journal of International Law* 288 (2003), p. 9, UN Doc. E/CN.4/Sub.2/1998/13, *ibid.*, para. 7, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Minimum Humanitarian Standards, Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21, UN Doc. E/CN.4/1998/87, 5 January, 1998, para. 33, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June, 2008, R. Coomaraswamy, 'Sexual Violence during Wartime', in H. Durham and T. Gurd (eds.), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers, Leiden, 2005), p. 55, F. Bensouda,'Gender and Sexual Violence Under the Rome Statute', in E. Decaux *et al.* (ed.), *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist, the Late Judge Laity Kama* (Brill, Leiden, 2007), p. 402.

12 *See e.g.* on *Rwanda*: Report on the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Séqui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission Resolution UN Doc. E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1996/68, 29 January 1996, para. 16, *Former Yugoslavia:* Annex: Final Report of the Commission of Experts Pursuant to Security Council Resolution 780, (1992), UN SCOR, 49th Session, UN Doc. S/1994/674, paras. 250-251 and M. Ellis, 'Breaking the Silence: Rape as an International Crime', 38 *Case Western Reserve Journal of International Law* 225 (2006), p. 226, *Sierra Leone*: Women, War and Peace, UNIFEM, 2002, Vol. 1, p. 9, *Darfur*: Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/60, 1 February 2005, the *DRC*: Report of the Secretary-General pursuant to Security Council Resolution 1820, UN Doc. S/2009/362, 15 July 2009, para. 12.

to domestic legal systems. Though international human rights law is founded on the quality of human dignity, this has not until recently been interpreted in a gender-conscious manner to include sexual autonomy.

This silence in public international law in the fields of international human rights law, IHL and international criminal law on matters relating to women's rights has been a reflection of the lack of acknowledgment of particular concerns of women. As Dinah Shelton argues: "[L]aws reflect the current needs and recognise the present values of society."[13] Law thus functions as an instrument of deterrence and punishment, but it also has a value-generating force and acts as a catalyst for social change, *e.g.* concerning gender roles. This is also true for public international law, which should reflect such values as gender equality in its aim of providing for the protection of the person.

However, efforts to remedy the lacunas in international law have been made by the international community, acknowledging sexual violence as one of the gravest forms of violations of public international law. As this book will demonstrate, international law on the protection against rape is dynamic, continually developing and expanding in scope with regard to state obligations. The UN Secretary-General has emphasised that human rights violations of women, such as rape, are more than harms done to the individual and affect societies at large and "undermine the development, peace and security of entire societies".[14] It is understood that women's rights do not solely affect this particular group, but has a resonance in the social, political and economic life of society in general.[15] The UN Secretary-General in Resolution 1325 called attention to the disproportionate impact on women in armed conflict, *e.g.* through sexual violence, and in Resolutions 1820 and 1888 noted the practice of rape as a tactic of war in modern armed conflicts.[16] These Resolutions call on states to eradicate such conduct and to end impunity. The *ad hoc* tribunals, established subsequent to the armed conflicts in Rwanda and Yugoslavia, have interpreted rape as a form of international crime. The Rome Statute of the International Criminal Court (ICC) has also been instrumental in recognising sexual violence as a matter of the utmost concern for the international community.[17] The explicit mention of the prohibition of rape as a violation of international human rights law in regional treaties generating state obligations is limited but has increasingly been interpreted under the *chapeau* of other human rights.[18] A con-

13 D. Shelton, 'Introduction: Law, Non-Law and the Problem of "Soft Law"', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000), p. 7.

14 United Nations Secretary General's Message on The International Day for the Elimination of Violence against Women, 25 November 2008.

15 H. Steiner *et al.*, *International Human Rights in Context, Law, Politics, Morals*, 3rd ed. (Oxford University Press, Oxford, 2008), p. 175.

16 SC Res. 1325 on Women, Peace and Security, UN Doc. S/RES/1325, 31 October 2000, Resolution 1820, UN Doc. S/RES/1820, 19 June 2008, 1888.

17 Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9.

18 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, 11 July 2003, CAB/LEG/66.6.

vention has also been drafted by the Council of Europe in 2009 containing an explicit obligation for member states to enact criminal laws on rape, including its definition.[19]

The *prohibition* of rape is thus uniform in international law. A *definition* of rape has, however, been a late concern of international law, with the first efforts made by the *ad hoc* tribunals, followed by regional human rights courts and UN treaty bodies.[20] States are consequently increasingly circumscribed in their flexibility to enact domestic criminal laws on rape, with obligations as to the adoption of specific elements of the crime. Much of this development has been parallel to the understanding of the harm of rape, which is central to the construction of its definition. Whether harm is considered to be similar to a violation of property rights, the dishonour of the victim, a crime against the community or the autonomy of the person, has been instrumental in the development of the classification and definition of rape, both at the domestic and international law level.

The purpose of this work is to attempt to systematise regulations concerning the prohibition on rape and, ultimately, its definition in public international law, comparing the areas of international human rights law, international criminal law and, to a certain extent, IHL. Though these fields of law share a common core of protecting human dignity, they present certain distinctive characteristics relevant to the approach of criminalising rape. International human rights law governs the conduct of states and provides standards by which individuals can raise claims against the state through various international and regional mechanisms. Notwithstanding its applicability in war, this regime has traditionally and primarily concerned itself with the administration of rules in peacetime. IHL is applicable to the "parties of the armed conflict" and regulates state and individual conduct in such armed struggles. International criminal law is an amalgam of these two areas and establishes individual criminal responsibility for three crimes considered of an international character: genocide, crimes against humanity and war crimes. Though IHL and international criminal law partly, or wholly, regulate individual criminal responsibility, this book solely concerns itself with the extent of state responsibility, in these cases delineating the extent of obligations in implementation.

Through the systematisation of provisions, this study will elucidate two main questions: 1) What obligations exist on states under international law in these three increasingly converging areas to *criminalise* rape? 2) Does the obligation demand the adoption of a specific *definition* of rape? In doing so, this work will analyse the traditional sources of international law, with an emphasis on relevant treaties and judicial decisions, and proceed to an examination of indications of an emerging customary international law.

Such systematisation will accentuate overarching questions of harmonisation or fragmentation of public international law and the risks or merits of approaching a specific question in a comparative manner, from the perspective of diverse fields of law.

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19 Draft Convention on Preventing and Combating Violence against Women and Domestic Violence, CAHVIO (2009) 32 Prov., Council of Europe, Strasbourg, 15 October 2009.

20 The term "*ad hoc* tribunals" signifies the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia.

Since the examined areas of international law strive to protect the same interests, it is a natural development that they should necessarily function as complementary mechanisms of protection.[21] Evident in this work is that the field of public international law since the Second World War has undergone substantial changes in its application, allowing for greater forays into the internal affairs of states. This evolution in part stems from the process of humanisation, whereby the scope of accountability for human rights transgressions has expanded to include state responsibility for violations committed between private actors and individual accountability for international crimes. This process has to a certain extent led to a convergence of international criminal law, IHL and international human rights law and has involved mutual interpretations of related concepts, with the principle of human dignity forming a common basis.

As will be seen, the *ad hoc* tribunals for Rwanda and the former Yugoslavia, as well as the regional human rights courts, in their case law frequently refer to legal reasoning concerning not only the qualification, but also the definitions of rape developed by other courts and tribunals, regardless of whether they concern international human rights law or international criminal law. Despite such convergence, the question arises in this book of whether such development is appropriate considering the difference in *context* between these areas. An understanding of what constitutes coercive circumstances might be answered differently depending on whether rape occurs in an armed conflict or peacetime. Is fragmentation perhaps valid and necessary in defining rape with regard to the difference in aim of international criminal law, IHL and international human rights law? Or should we be striving towards even further harmonisation between these bodies of law? Put simply, does the context define how one views the crime? The setting, such as the dichotomy between armed conflict and peacetime might well be of relevance from the standpoint of *jurisdiction* – that is, do the circumstances in which the offence of rape is committed perhaps qualify it as an international crime? Does rape committed during an armed conflict warrant a different *definition* of the crime – for example, as to the elements of "force" or "non-consent"? Or does the context simply serve as *evidence* with respect to "coercion"? Accordingly, I shall in these areas explore similarities and divergences in the international accountability for the crime of rape.

21 Human rights law has *e.g.* influenced the formation of customary rules of humanitarian law identified by the ICRC. International humanitarian law has also become necessary for the protection of human rights, through the creation of the discipline of international criminal law and individual accountability. International criminal law itself and the international crimes are a result of the fusion between IHL and human rights. *See* J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross (Cambridge University Press, Cambridge, 2005), hereafter denoted 'The ICRC Study on Customary International Humanitarian Law'. *See also* T. Meron, 'The Humanization of Humanitarian Law', 94 *American Journal of International Law* 239 (2002), p. 244: "Through a process of osmosis or application by analogy, the recognition as customary of norms rooted in international human rights instruments has affected the interpretation, and eventually the status, of parallel norms in instruments of international humanitarian law."